been approved in more than one judicial decision in the Courts of the Federation and in Singapore, to record an order of acquittal in such a case unless there are special circumstances favouring the alternative course. As regards, however, matters which come before a Magistrate by way of a Preliminary Inquiry it would seem that the Legislature has vested in the Magistrate no such discretion.

Section 139(1) of the Criminal Procedure Code reads as follows:—

"When the evidence in support of the prosecution has been taken, the Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, discharge him."

Learned counsel for the petitioners concedes that the order of the learned Magistrate did not offend against this sub-section but invites me to invoke the "paternal and supervisory" jurisdiction that is vested in me by section 311 of the Criminal Procedure Code to vary the learned Magistrate's order if I am satisfied that hardship flows therefrom.

In effect, I am invited to reverse an order of the Magistrate which he is by statute impelled to make, and to substitute an order which he is not empowered to make. The Legislature has thought fit to distinguish between the procedures to be adopted in Preliminary Inquiries and those in Summary Trials before a Magistrate or Prosecutions before the Assize or District Courts. If I were to accede to this invitation in the exercise of my powers of revision, it would seem that I would not be revising but legislating. And that is not the province of a Court.

The petition is therefore refused.

Petition refused.

YAP CHOON KONG & ORS. v. THE RETURNING OFFICER, KLUANG & ORS.

[O.C.J. (Adams J.) September 2, 1961]

[J.B. — Election Petition No. 4 of 1961]

Election Petition — Election Offences Ordinance, 1954, s.32 — Local Government Elections Act, 1960, 2nd Schedule — Constitution of the Town Council of Kluang, art. 5(d) — Disqualification under — Must be based on reg. 11(1) of Local Government (Conduct of Elections) Regulations, 1960.

This was a petition under section 32 of the Elections Offences Ordinance, 1954, to determine whether the persons returned to certain wards in the Township of Kluang were duly elected. It was argued for the petitioners that (1) the Election Officer was wrong in law in disqualifying them under paragraph 2(g) of the Second Schedule to the Local Government Elections Act, 1960, and (2) the respondents who were returned unopposed were at the time of their elections persons disqualified under Article 5(d) of the Constitution of the Town Council of Kluang.

Held: (1) since there has been no non-compliance with the provisions of any written law there is no remedy by way of an election petition open to the petitioners;

(2) an objection to be valid under Article 5(d) of the Constitution of the Town Council of Kluang must be based on the grounds set out in Regulation 11(1) of the Local Government (Conduct of Elections) Regulations, 1960.

Case referred to:—

(1) *Re the Election Petition of Cheah Seng Teck* [1958] M.L.J. 275 at p. 278.

ELECTION PETITION.

S. K. Lee for the petitioners.

Dato D. C. Jackson (Legal Adviser, Johore) for the Returning Officer.

R. S. Boswell for the other 3 respondents.

Cur. Adv. Vult.

Adams J.: This is a petition brought by Yap Choon Kong of 21, Jalan Pasar, Kluang, Benedict DeCosta of 88 Jalan Mengkibol, Kluang, and Chiam Teck Kwee of 196-6, Jalan Mersing, Kluang, under section 32 of the Election Offences Ordinance, 1954, to determine whether the persons returned as being duly elected to the Bakar Sampah Ward, the Yap Tau Sah Ward, and the Yap Tau Sah Timah Ward in Township of Kluang were duly elected. Mr. S. K. Lee appears for all three petitioners, Mr. Boswell for the respondents, and the Hon'ble Dato Jackson, Legal Adviser, Johore, for the Returning Officer.

There are two grounds upon which the petition is based, firstly, that the petitioners are not disqualified from being Councillors under para. 2(g) of Second Schedule to the Local Government Elections Act, 1960, and that the decision of the Returning Officer in so disqualifying them was wrong in law and affected the result of the Election and secondly, that the respondents who were returned unopposed were at the time of their elections persons disqualified under Article 5(d) of the Constitution of the Town Council of Kluang.

The facts are in no way in dispute. The petitioners are all members of the Labour Party, and the respondents are all members of the Alliance Party who sought to contest the Kluang Town Council Elections in the Wards abovementioned at the Local Government Elections which were due to take place in Kluang on the 24th May, 1961. The three petitioners are all civilian employees employed by Her Britannic Majesty's Armed Forces who are present in the Federation of Malaya as a result of a treaty made by the Government of the Federation of Malaya and Her Britannic Majesty's Government. They are Federal citizens, and there is nothing in their terms of employment by Her Britannic Majesty's Armed Forces prohibiting the petitioners from contesting such elections as these and indeed the petitioners had the necessary permission from their employer so to do.

The petitioners and the respondents duly attended at the proper place on the 24th April, 1961 for the purpose of filing their nomination papers, which they duly did. When nominations

closed persons competent to do so filed objections to the three Alliance candidates in writing. These objections stated that the candidate named therein "is not able to read and write the Malay or English language with a degree of proficiency." At the same time, apparently, objections had been taken that the petitioners were not competent to stand by virtue of para. 2(g) of the First Schedule to the Local Government Elections Act, 1960, in that they were employed full time by the Commonwealth Armed Forces stationed in the Federation and this constituted holding whole time office in a public service in the Federation.

The Returning Officer deposed that he considered the objection against the petitioners, and having consulted a ruling on the subject from the Attorney-General, upheld the objection. He thereupon informed the petitioners that they were disqualified from being elected as Councillors. He then said that he overruled the objections filed by certain objectors on the question of language because he had received an instruction from the Election Commission to do so and to advise the person against whom the objection was lodged that if he were not proficient in English or Malay to enable him to follow the proceedings in the Council he might well find his election the subject of an election petition. He then returned the Alliance candidates unopposed.

The qualifications of a Councillor are set out in the First Schedule to the Local Government Elections Act, 1960. The First Schedule also sets out the circumstances which disqualify a person from being a Councillor. The disqualification of the petitioners is based on para. 2(g) which reads:—

"A person shall be disqualified from being a Councillor if:—

(g) in the case of an elected Councillor he holds any whole time office in any public service in the Federation."

The Returning Officer decided having considered the advice of the principal law officer of the Government on this point, that the Armed Forces of Her Britannic Majesty were a public service within the Federation of Malaya and allowed the objection.

Both Mr. Boswell and Dato' Jackson argued that it was not open to the petitioners to dispute the ruling of the Returning Officer on this point by way of an Election Petition. The relevant provisions dealing with the lodging and determining of objections are contained in Regulation 11 of the Local Government (Conduct of Elections) Regulations, 1960. Regulation 11(1)(c), I presume, is the sub-regulation under which the objection was lodged. It reads as follows:—

"11. (1) Objection may be made to a nomination paper by any person whose name appears in the electoral rolls for the ward and by any candidate for the ward on all or any of the following grounds but on no other ground, namely:

(c) that it is apparent from the contents of the nomination paper that the candidate is not capable of being elected as a Councillor."

Presumably the petitioners' occupation as civilian employees of Her Britannic Majesty's Armed Forces stationed in the Federation was disclosed on the nomination papers and the Returning Officer made enquiry in accordance with Regulation 11(4) into the matter and relied for legal advice on an opinion of he Attorney-General, and following that advice he ruled that the petitioners' employment was a full time holding of office in a Public Service in the Federation. Having enquired into the objection with the least possible delay, and having resolved it, he communicated his decision with the grounds therefor to the candidates. The Returning Officer meticulously complied with Regulation 11(4). Mr. S. K. Lee argues that the Commonwealth Forces are not a public service. They are here, he says, like any commercial firm except that instead of delivering a pound of tea when asked, they provide protection against invasion and aggression from outside the realm, the cost being borne by the British or other Commonwealth taxpayer as the case may be. Both Mr. Boswell and Dato' Jackson argued contra and pointed out that there has been a change in the law to include 'any' public service in the Federation and not as heretofore. The Local Government Elections Act, 1960, has standardised the disqualifications of Councillors. Prior to this each Town Council had its own constitution made under the Johore Town Boards Enactment, section 3(b), and the Local Authorities Election Ordinance, 1950, section 51, and the relevant provision in the old constitution read:

"No person shall be capable of being elected or appointed as a Councillor who at the time of his election or appointment as the case may be:—

(e) is a person holding any office of emolument under any Government in the Federation."

In view of what I shall have to say on the second argument by Mr. Boswell and Dato' Jackson, it would be wrong for me to decide this very interesting point. Anything that I say thereon would be *obiter*. Mr. Boswell and Dato' Jackson argue further that the decision of the Returning Officer once taken in accordance with the provisions of Regulation 11(4) is final and cannot be the subject of an election petition. The question to be decided, therefore, is whether or not an Election petition does lie in the case where the Returning Officer has reached his decision after observing all the formalities prescribed by the law.

The provisions relating to the decision of the Returning Officer are contained in Regulation 11(5) which reads as follows:

"(5) The decision of the returning officer shall be final and conclusive for the purposes of the election in respect of which the proceedings are being held, and shall not be called in question in any Court:

Provided that any person aggrieved by the decision of the returning officer may present an election petition in respect thereof on the grounds set out in paragraph (b) of section 32 of the Election Offences Ordinance, 1954, and the provisions of the said Ordinance shall take effect accordingly."

It follows from this, therefore, that the decision of the Returning Officer is final except that it can be the subject of an Election Petition on any of the grounds set out in section 32(b). This is as follows:—

"32. The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the Election Judge, namely—

(b) non-compliance with the provisions of any written law relating to any election, if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election."

But what happened here? An objection was lodged under Regulation 11(1). It was considered with the least possible delay and it was allowed. The result was communicated to the petitioners and grounds for his so deciding. namely that they were full time holders of an office in any Public Service in the Federation, and he therefore complied with Regulation 11(4), and therefore I do not think, since there has been no non-compliance with the provisions of any written law relating to his election and it does not appear that the election was conducted not in accordance with the principles laid down in such written law, that there is any remedy by way of election petition open to the petitioners on this point. I respectfully associate myself with the views expressed by Rigby J. in *Re the Election Petition of Cheah Seng Teck* (1) at p. 278, and the petitioners on this ground must fail. what other remedy they may have (if any) as Rigby J. also pointed out is not for me to decide.

The petitioners also complain that objections were lodged against the three Alliance candidates under reg.11(1)(e) on the grounds that they are disqualified under section 6 of the Local Government Elections Act, 1960. The objection arises in this way. Section 5 of the Local Government Elections Act, 1960, gives power to the State Authority by Order to lay down what amounts to a constitution for Town Boards and District Boards. The State Authority did this in respect to Kluang by the Town Council of Kluang Order, 1961, which was duly published in the *Government of Johore Gazette* as J.L.N. 22 on 30th March, 1961, and it came into force on the 1st April, 1961. By Article 5(d) of that constitution a person is disqualified from being a Councillor if he is not able to speak and, unless incapacitated by blindness or other physical cause, is not able to read and write the Malay or English language with a degree of proficiency, sufficient in the opinion of the State Secretary or any person appointed by the State Secretary in that behalf, to enable him to take an active part in the proceedings of the Council. This, therefore, as Rigby J. says in the *Cheah Seng Teck's Petition* is a prerequisite to the election of a person as a Councillor.

If, therefore, there was a proper and valid objection under Article 5(d) he has failed to comply with the provisions of a written law relating to elections and such non-compliance meant that the election was not conducted in accordance with such written law. If such non-compliance could be shown to have fulfilled the final requirement to which Rigby J. refers in *Re Cheah Seng Teck's Petition*, that is to say, to use his words, "The non-compliance must have affected the result of the election" then this petition could succeed, but was there in fact a proper and valid objection within the purview of Article 5(d)? In each and every case the objection states that the respondents are not able to read the Malay or English language with a degree of proficiency. Dato' Jackson argued that this was not sufficient to constitute a valid objection. He argued that valid objections can only be made on the grounds set out in Regulation 11 and no other. The constitution of the Town Council of Kluang does not simply say that a person shall be disqualified from being a Councillor if he is not able to read and write the Malay or English language with a degree of proficiency but, to put in broadly, with a degree of proficiency sufficient in the opinion of the State Secretary or any person appointed by the State Secretary in that behalf to enable him to take an active part in the proceedings of the Town Council. He argued that the Election Laws and the Regulations were strictly drawn and must be strictly construed and that in the interests of the State and good government Election matters had to be decided quickly and on the spot by the Returning Officer who had no time nor was he bound by law to look into fatuous complaints. He said, for example, it would not be a valid objection merely to say that a candidate was mad, or a criminal, or a bankrupt, but that it was necessary to allege the precise disqualification as laid down in the Second Schedule of the Local Government Elections Act, 1960. I think Dato' Jackson is right. The Returning Officer cannot be expected to investigate wild objections based on vague allegations. The objection to be valid must be based on the grounds set out in Regulation 11(1) Regulation 11(1) read with Article 5(d) of the Kluang Town Council Constitution does not make a lack of being able to read or write the English language with a degree of proficiency a ground of objection, and it is nowhere laid down that such a deficiency is a disqualification for a person to be a Councillor. In my opinion the Returning Officer should have rejected these objections on the ground that they were not covered by Regulation 11(1). The failure of the Returning Officer therefore to comply with the provisions of Regulation 11(4) and investigate the complaint has not affected the result of the Election.

The petition must therefore be dismissed and I will now hear argument on the question of costs.

Petition dismissed.

Solicitors: *S. K. Lee; Boswell, Hsieh & Lim.*